

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION**

TESORO REFINING AND MARKETING
COMPANY LLC,

Plaintiff,

vs.

NATIONAL UNION FIRE INSURANCE
COMPANY OF PITTSBURGH, PA,

Defendant.

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Case No.: SA-13-CV-931-DAE

**DEFENDANT NATIONAL UNION'S OPPOSED MOTION TO STRIKE PLAINTIFF'S
UNTIMELY MOTION TO EXCLUDE TESTIMONY OF JAMES C. SPINDLER**

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ATTORNEYS FOR DEFENDANT NATIONAL
UNION FIRE INS. CO. OF PITTSBURGH, Pa.

National Union Fire Insurance Company of Pittsburgh, Pa. (“National Union”) moves to strike Plaintiff Tesoro Refining and Marketing Company LLC’s (“Tesoro”) *Untimely* Motion to Exclude Certain Portions of the Testimony of Defense Expert James C. Spindler [Dkt. No. 157] (“Spindler Motion”).

I. INTRODUCTION

The Court should not consider Tesoro’s late-filed motion. The Court’s Scheduling Order entered on November 12, 2013 [Dkt. 59] expressly required Tesoro to file any objection to the reliability of National Union’s expert, James C. Spindler under Federal Rule of Evidence 702, by November 14, 2014. Instead, without regard for the Court’s Scheduling Order, Tesoro filed its Spindler Motion under Rule 702 on November 17, 2014. Tesoro should not be permitted to disregard the Court’s Scheduling Order and self-impose new deadlines in this case. National Union’s Motion to Strike Tesoro’s untimely motion should be granted.

II. ARGUMENT

A. The Court Has The Power To Strike Tesoro’s Untimely Motion

Rule 16(b) of the Federal Rules of Civil Procedure authorizes the district court to control and expedite pretrial discovery through a scheduling order. Consistent with the authority vested in the trial court by Rule 16, the Fifth Circuit gives the trial court “broad discretion to preserve the integrity and purpose of the pretrial order.” *Hodges v. United States*, 597 F.2d 1014, 1018 (5th Cir.1979) (affirmed refusal to modify pre-trial order); *see also* Fed. R. Civ. P. 16(b), Advisory Committee Note (trial court may modify scheduling order for good cause); Fed. R. Civ. P. 16(f) (court may sanction party's failure to comply with scheduling order by excluding evidence).

B. Tesoro Disobeyed The Court's Scheduling Order By Filing Its Spindler Motion After The Court-Ordered Deadline

The Court's Scheduling Order entered on November 12, 2013 [Dkt. 59] explicitly provides, in relevant part:

5. An objection to the reliability of an expert's proposed testimony under Federal Rule of Evidence 702 shall be made by motion, specifically stating the basis for the objection and identifying the objectionable testimony, within thirty (30) days of receipt of the written report of the expert's proposed testimony, or *within thirty (30) days of the expert's deposition*, if a deposition is taken, whichever is later.”

(Court's Scheduling Order [Dkt. 59], ¶ 5.) (Emphasis added.)¹ On August 7, 2014, National Union produced Dr. Spindler's Expert Report dated July 21, 2014 to Tesoro. (Neumann Decl., ¶ 4). Dr. Spindler's deposition was commenced on October 14, 2014 and completed on October 15, 2014. (*Id.* at ¶ 5.) Thus, under the express terms of the Court's Scheduling Order, any objection Tesoro has to the reliability of Dr. Spindler's proposed testimony under Federal Rule of Evidence 702 had to be made, if at all, by November 14, 2014. In direct disregard of the Court's Order, Tesoro filed its Spindler Motion on November 17, 2014. (Dkt. No. 157.)

There is no good cause to amend the Court's Scheduling Order to allow Tesoro to belatedly file its Motion. Tesoro did not seek such relief from the Court and has provided the Court with no explanation or excuse for its late filing. Instead, Tesoro simply ignored the Court's deadline and filed its late motion, forcing National Union to file this Motion to Strike.

III. CONCLUSION AND REQUEST FOR RELIEF

For the reasons described above, this Court should strike Tesoro's untimely Spindler Motion in its entirety.

¹ While the Court's Scheduling Order has been amended two times since November 12, 2013 [Dkt. Nos 67 & 69] the parties never agreed to amend Paragraph 5 of the Scheduling Order and the Court never modified that deadline. (Declaration of Jon T. Neumann [“Neumann Decl.”], ¶ 2-3.)

Dated: November 18, 2014

Respectfully submitted,

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CERTIFICATE OF CONFERENCE

Defendant's counsel has conferred with Plaintiff's counsel by email and telephone on November 17, 2014 and via email on November 18, 2014, regarding this Motion, and determined that the motion is opposed by Tesoro. Accordingly, Defendant finds it necessary to file this Motion and seek an Order of the Court striking as untimely Tesoro's Motion to Exclude Certain Portions of the Testimony of Defense Expert James C. Spindler [Dk. No. 157].

/s/ Jon T. Neumann
Jon T. Neumann

CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of November, 2014, I electronically filed the foregoing Opposed Motion To Strike Plaintiff's Untimely Motion To Exclude Testimony Of James C. Spindler with the Clerk of the Court using the CM/ECF filing system, which will send notification of filing by service of email on all counsel of record registered with CM/ECF.

/s/ Jon T. Neumann

Jon T. Neumann